CSBG 200-3 Administration: CSBG Montana Legal Liability

Overview: This Chapter provides information pertaining to Montana HRDCs' legal liability as summarized through the Legal Liability Audit conducted by CAPLAW in June 2012. We use this with CAPLAW's permission.

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CAPLAW Legal Liability Audit: Montana Supplement

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This supplement summarizes those Montana laws applicable to nonprofit organizations that are relevant to Community Action Agencies (CAAs).

IMPORTANT NOTE: This supplement is not intended to provide legal or business advice and is not a substitute for the services of an attorney. This supplement summarizes only certain sections of the statutes referenced and is intended to be used simply as a guide. For greater detail, the statutes themselves should be consulted. Additionally, we strongly recommend that any CAA using this supplement consult with a Montana attorney before making any determinations relating to the laws discussed herein.

Montana Nonprofit Corporate Requirements

Title 35, Chapter 2 of the Montana Code Annotated (MCA) contains all of the applicable Montana statutes associated with nonprofit corporations. (The nonprofit corporation statutes are available on line at http://data.opi.mt.gov/bills/mca_toc/35_2.htm.) This chapter of the MCA is commonly known as the "Montana Nonprofit Corporation Act" (the "Act"). The Act was last substantially amended in 1991 to correspond in most parts with the Model Nonprofit Corporation Act that was prepared by the American Bar Association. As such, most of the Act's provisions are similar to the nonprofit statutes of the majority of the other states in the nation. Minor amendments of the Act have followed in 2007 and 2011.

Anyone seeking to incorporate a new nonprofit organization should review the entire Act and all relevant statutes that are associated with the proposed actions of the new corporation. Additionally, preexisting organizations, especially those that were established prior to 1991, should review the Act to ensure that its operations and organizational documents are consistent with the statutory requirements.

Following are some of the highlights of the Montana Nonprofit Corporation Act:

1. Corporate Powers

Section 35-2-118, MCA, provides for the general powers of a nonprofit corporation. An organization's articles of incorporation can provide specific powers that are consistent with those listed in the general powers, however, if the articles of incorporation are silent with regard to general powers, then those listed in the statute will control. The "general powers" dealt with in this statute are intended to govern the types of actions that are allowable for a corporation and its board of directors to approve. This differs from the corporation's "purpose" which may be narrowly drafted to comply with federal law or to achieve the organization's tax-exempt status.

2. Filing Requirements

Section 35-2-119, MCA, sets forth all of the required elements for a document to be filed with the Secretary of State's office. This section works in conjunction with Section 35-2-213, MCA, setting forth all of the required provisions that must be included within articles of incorporation filed with the Secretary of State. The Secretary of State's web site at http://sos.mt.gov/business/Forms/index.asp#npcdomestic provides a number of forms for the common actions of the Montana nonprofit corporation.

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Section 35-2-419, MCA, provides that the articles of incorporation or bylaws must specify the terms of the directors. Terms of directors may not exceed five (5) years. In the absence of any term specified by the articles of incorporation or bylaws, the term for each director is statutorily set at one (1) year. The articles or bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups, and the statute indicates that the terms of the office of the groups need not be uniform.

Section 35-2-421, MCA, provides for the removal of directors. There is a set procedure that must be followed if the corporation is a membership corporation. If the organization is not a membership organization, then a director may be removed without cause by a vote of two-thirds of the directors in office or by a greater number if it is set forth by the articles or bylaws. Additionally, if, at the beginning of a director's term on the board, the articles or bylaws provide that the director may be removed for missing a specified number of board meetings, the board may remove the director for failing to attend the specified number of meetings. However, the director may be removed for such purpose only if a majority of directors then in office vote for the removal.

5. Board Meetings

Section 35-2-427, MCA, sets forth the requirements for board meetings. Board meetings may be held either within or outside of the state. Organizations may hold board meetings through the use of conference telephone so long as all directors participating in the meeting may simultaneously hear each other during the meeting. Note that there is no statutory provision for a director to provide a "proxy" to any other member of the board of directors. As such, a director must be present in person or via conference call to act on a matter, unless the unanimous consent provision discussed below is used.

Section 35-2-428, MCA, provides that a board may take an action without a formal meeting only if a written consent describing the action that is taken is signed by every director authorized to vote and is included in the minutes of the organization.

Section 35-2-429, MCA, provides the requirements for the call and notice of meetings of the board of directors. Unless the date of a meeting is specified in the organization's bylaws, then all meetings of the board of directors must be preceded by at least two (2) days notice to each director of the date, time and place of the meeting. Montana law allows for fairly lenient forms of notice. Unless the articles or bylaws specify a different type, then notice simply must be reasonable under the circumstances. Section 35-2-115, MCA, provides that notice may be communicated in person; by telephone, telegraph, teletype, fax, or other form of wired or wireless communication; or by mail or private carrier. Additionally, if these forms of personal notice are impracticable for the form of the governing body, then notice may be communicated by a newspaper of general circulation in the area where it is published, or by radio, television, or other form of public broadcast.

Montana has a very broad definition of agencies that are subject to the state's "open meeting" laws. Section 2-3-203, MCA, provides that the meetings of all organizations "supported in whole or in part by public funds or expending public funds must be open to the public." Although there has been no direct guidance or ruling on this matter, it appears that these provisions apply to all of the Human Resource Development Councils in the state because all of the organizations are funded in whole or in part by governmental block grant funds.

Section 35-2-431, MCA, provides for the quorum and voting requirements of the board. The minimum statutory requirements for a quorum are the greater of one-third of the number of directors in office or two directors. The bylaws or articles may set a quorum requirement higher than the required quorum for the board's meetings. If the bylaws or articles are silent, then the statute provides that a majority of the directors in office constitutes a quorum. Unless the articles or bylaws provide otherwise, a vote of a majority of the directors present is the act of the board.

6. Officers

Sections 35-2-439 through 444, MCA, set forth the duties and standards of conduct for the corporation's officers. The officers shall have the authority and shall conduct the duties that are set forth in the bylaws or as otherwise directed by the board of directors. The bylaws should

provide a detailed description of the duties to be performed, as well as the procedure for board oversight of the officers' actions. Officers usually are board members, but this is not required.

7. Indemnification of Board Members and Officers

Sections 35-2-447 through 454, MCA, provide the authority and the manner in which an organization can indemnify its officers and directors against liability incurred in the course of an individual's service to the corporation. A corporation may indemnify an officer or director if the individual acted in good faith and reasonably believed his or her actions were in the best interest of the corporation. An individual may not be indemnified if the individual is found liable of improper personal benefit in a proceeding brought by or on behalf of the corporation. The Act provides for both mandatory and permissible indemnification.

Mandatory Indemnification. A corporation must indemnify a director or former director, who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he or she was a party because he or she is or was a director of the corporation against reasonable expenses incurred by him or her in connection with the proceedings.

Permissible Indemnification. If the bylaws provide for it, the corporation may indemnify a director or former director made a party to a proceeding because he or she is or was a director of the corporation, against liability incurred in the proceeding, if determination to indemnify him or her has been made in the manner prescribed by the Act and payment has been authorized in the manner prescribed by the Act.

Indemnification of Officers, Agents and Employees. The bylaws can provide that an officer of the corporation who is not a director is entitled to mandatory indemnification under this Article to the same extent as a director. The corporation may also indemnify and advance expenses to an officer, employee, or agent of the corporation who is not a director to the same extent as a director or to any extent, consistent with the Act and public policy, that may be provided by the general or specific action of the board or by contract.

Insurance. The corporation may purchase and maintain insurance (a) to insure itself with respect to the indemnification payments it is authorized or obligated to make pursuant to this Article, and (b) on behalf of any person who is or was a director, officer, employee or agent of the Corporation.

8. Annual Reports

Section 35-2-904, MCA, requires that all nonprofit corporations must deliver an annual report to the Secretary of State setting forth the name of the corporation, the jurisdiction under whose law it is incorporated, its principal officers and directors, its registered agent, the registered business mailing address of its principal office, whether or not it has members, and a brief description of the nature of its activities. The Secretary of State generally mails its annual statement form out in February of each year, and the corporation must deliver the completed form by April 15. Failure to file the annual statement can result in the corporation losing its corporate status and

being involuntarily dissolved. See the link in the Filing Requirements section above to download annual report forms.

Montana Community Services Block Grant Program

Note that although the Act provides that a board may have as few as three (3) directors, Human Resource Development Councils (HRDCs) must also structure their board of directors to be compliant with the eligibility requirements set forth in 42 U.S.C. § 9904, including the composition of the board of directors. As such, the board of directors of a Human Resource Development Council must be composed of at least one-third who are representatives of the poor, one-third who are publicly elected officers, and the remaining one-third who are members of business, industry, labor, religious, welfare, education, or "other major groups" in the community.

Sections 53-10-501 through 505, MCA, provide the statutory guidelines for the HRDCs' conduct of programs using the block grant funds. These provisions pull in many of the requirements set forth in the federal block grant act and may be viewed at http://data.opi.mt.gov/bills/mca_toc/53_10_5.htm. Sections have not been amended as recently as the federal act, and therefore there appear to be some requirements in the Montana statutes that are inconsistent with the more recent amendments of the federal law. In such case, it is most likely that to the extent that the Montana requirements are not consistent with the federal law, then the federal requirements will override the Montana requirements.

Open Meetings Law

Board meetings of public and private Human Resource Development Councils must be open to the public. The Montana open meetings law requires that "[a]ll meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds … must be open to the public." § 2-3-203, MCA.

The public's right to attend meetings of public HRDCs is also grounded in the Montana constitution, which provides that "[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure" and that "[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Mont. Const. art. II, §§ 8 and 9.

For more information regarding Montana's open meetings law, please refer to "The Basics of Open Meetings and Public Participation" produced by the Montana County Attorneys Association here:
http://www.mtcoattorneysassn.org/documents/The%20basics%20of%20Open%20meeting.pdf

I. Notice to the Public

A. What Meetings Must Be Noticed?

1. Any "convening of a quorum of the constituent membership … whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the [organization] has supervision, control, jurisdiction, or advisory power." § 2-3-202, MCA. This includes special meetings, meetings intended to be closed, and meetings between the board and its staff. 41 Att. Gen. Op. 38.

2. Any board-appointed committees and subcommittees meeting to conduct organization business. § 2-3-203(6), MCA.

3. Public meetings may be recorded, videotaped, or televised by any accredited press representative; however, the presiding office may assure this activity does not interfere with the meeting. § 2-3-211, MCA.

B. Specific Notice Requirements When Convening in Executive Session

Boards must follow all notice requirements applicable to open meetings when convening in executive session.

The agenda should be formulated in such a way to protect the privacy interests justifying an executive session: use of case numbers or agenda item numbers, etc.

In addition to the responsibilities of notice applicable to open session meetings, you have an additional responsibility to provide individual notice to any individual who will be discussed in executive session. *Goyen v. City of Troy*, 276 Mont. 213, 218, 915 P.2d 824, 828 (1996). *Goyen* involved the right to waive individual privacy in §2-3-203, MCA, and instructs that the right is meaningless unless the person about whom the discussion pertains is notified in advance of the discussion and given an opportunity to waive individual privacy thereby having the discussion held in open session.

C. Type of Notice Required

1. The fact that a meeting is not closed does not make it an open meeting in compliance with the law. Notice to the public is imperative. *Board of Trustees v. Board of City Commissioners*, 186 Mont. 148, 155-56, 606 P.2d 1069, 1073 (1980).

2. Publication in a newspaper creates a presumption of sufficient notice, but other types of notice may be sufficient, such as broadcasting, posting, or a combination of these. §2-3-104(4), MCA; *Sonstelie v. Board of Trustees*, 202 Mont. 415, 658 P.2d 413 (1983).

D. How Much Time Is Sufficient Notice?

1. There should be reasonable notice under the circumstances to permit public participation. Only rules of thumb are available but try to give at least one week's notice for regular meetings and at least 48 hours' notice for special meetings.

2. Notice to persons personally affected by the outcome of a meeting, such as employees subjected to board discipline, should be given sufficient time in which to prepare, consonant with board policies and state law.

3. Distribution of the agenda is a good way to give notice.

II. When Can a Meeting Be Closed?

A. All meetings are open unless closed for a specific purpose; this includes committee meetings. §2-3-203, MCA. Allowable purposes to close are:

1. During the time the discussion relates to a matter of individual privacy and then only if the presiding officer determines that the "demand of individual privacy clearly exceed the merits of public disclosure." If the party with the privacy interest waives his or her right of privacy, the meeting must be held in open session. Mont. Const. art. II, § 9; § 2-3-203(3), MCA; *Goyen*, 276 Mont. 213, 915 P. 2d 824.

2. Discussion of strategy to be followed with respect to litigation between a private party and the organization. (See Section IIB below.)

B. Individual Privacy

1. Cases in which the demands of individual privacy have been found to clearly exceed the merits of public disclosure:

a. Performance evaluations. *Missoulian v. Board of Regents*, 207 Mont. 513, 675 P.2d 962 (1984).

b. Grievance seeking discipline of school administrator. *Flesh v. Joint School District No. 2*, 241 Mont. 158, 786 P.2d 4 (1990).

c. The family and health problems, interpersonal relationships, personal finances, weaknesses, personal opinions, beliefs, and attitudes of employees or applicants for employment. *Missoulian*, 207 Mont. 513, 675 P.2d 962.

d. Discussion of employee performance for purposes of contract renewals. *Sonstelie*, 202 Mont. 415, 658 P.2d 413.

2. Cases in which the demands of individual privacy have *not* been found to clearly exceed the public's right to know:

a. The amounts of retirees' retirement benefits. 54 Att. Gen. Op. 3

b. Information about a public official's arrest which occurred during their term of service. *Jefferson County v. Montana Standard*, 318 Mont. 173, 79 P.3d 805 (2003).

3. Closure for personal privacy reasons does not mean the person discussed cannot be present. There is no basis to exclude the person about whom the discussion centers. An employee has the right to be present during board deliberations regarding his future with the employer. *Jarussi v. Board of Trustees*, 204 Mont.131, 664 P.2d 316 (1983).

4. A person may waive his or her right to privacy, in which case the meeting shall be open. § 2-3-203(3), MCA. Notice must be provided to the person who is the subject of discussion at the meeting, to enable him or her to waive his or her right to privacy. *See Goyen*, 276 Mont. 213, 219, 915 P. 2d 824, 828.

5. Where there are competing rights, i.e. an employee wants a disciplinary hearing open, but individuals testifying want privacy, weigh each person's right in accordance with the law, and close those portions of a meeting during which the discussion affects a protected privacy interest.

6. The law is unclear as to whether action can be taken in closed meetings since Section 2-3-203, MCA, allows closures during "discussions." It is probably wise to make all "actions" a matter of public record, but be sure to keep private matters private by careful wording of public actions (i.e. use an employee's initials or a number in the wording of a public action affecting an individual's privacy).

C. Penalties for Closure of a Meeting in Violation of Law

1. Decisions made at a meeting which violate the open meetings law may be declared void by a district court, § 2-3-213, MCA, and a person bringing such an action need not proceed through the county superintendent before filing suit. *Jarussi*, 204 Mont. 131, 664 P.2d 316.

2. A lawsuit to void agency decisions must be commenced within 30 days from the date on which the plaintiff or petitioner learns, or reasonably should have learned, of the decision. § 2-3-213, MCA.

3. A plaintiff who prevails in a district court action to enforce their rights under Article II, section 9 of the Montana constitution (right to know provision) may be awarded costs and attorney fees. § 2-3-221, MCA.

III. Minutes

A. Section 2-3-212, MCA, requires appropriate minutes to be kept.

B. Minutes of open meetings are open for public inspection. § 2-3-212, MCA.

C. Minutes of closed meetings may, but are not required to, be kept; but, as these meetings often address personnel issues, it may be a good idea to keep minutes of closed meetings. Since

the public's right to examine public documents does not extend to cases where the demand of individual privacy clearly exceeds the merits of public disclosure (Mont. Const. art. II, § 9), these minutes should be sealed and maintained separately. (They may be ordered to be released in subsequent court proceedings, however.) Reference may be made to their existence in the public minutes.

Public Records Law

There is no indication in the text of either the relevant provisions of the Montana constitution or the Montana public records statute that private nonprofits (even those supported with government funds), must make their records open to the public. Moreover, to date, no Montana court or attorney general's opinion has addressed whether the state's public records laws apply to private CAAs or other private nonprofits.